The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 07-105 September 18, 2008

Investigation by the Department of Public Utilities, on its own motion, commencing a rulemaking pursuant to 220 C.M.R. §§ 2.00 et seq., and for the purpose of amending 220 C.M.R.§ 1.00 et seq., Procedural Rules; 220 C.M.R. § 2.00 et seq., Adoption of Regulations; 220 C.M.R. § 5.00 et seq., Tariffs, Schedules and Contracts (Other Than Commercial Motor Vehicles); 220 C.M.R. § 6.00 et seq., Standard Cost of Gas Adjustment Clause; 220 C.M.R. § 7.00 et seq., Residential and Commercial Energy Conservation Service Program Cost Recovery; 220 C.M.R. § 8.00 et seq., Sales of Electricity By Qualifying Facilities and On-Site Generating Facilities To Distribution Companies, and Sales of Electricity By Distribution Companies To Qualifying Facilities and On-Site Generating Facilities; 220 C.M.R. § 9.00 et seq., Cost Recovery For Major Electric Company Generation Investments,; 220 C.M.R. § 11.00 et seq., Rules Governing Restructuring of the Electric Industry; 220 C.M.R. § 12.00 et seq., Standards of Conduct For Distribution Companies and Their Affiliates; 220 C.M.R. § 14.00 et seq., The Unbundling of Services Related To The Provision of Natural Gas; 220 C.M.R. § 25.00 et seq., Billing and Termination Procedures of the Department of Telecommunications and Energy; C.M.R. § 99.00 et seq., Procedures For the Determination and Enforcement of Violations of G.L. c. 82, § 40 ("Dig Safe"); 220 C.M.R. § 109.00 et seq., Design, Construction, Operation, and Maintenance of Intrastate Pipelines Operating In Excess of 200 PSIG; 220 C.M.R. § 126.00, Underground Electric Supply and Communications Lines 50,000 Volts and Below; 220 C.M.R. § 152.00 et seq., Sureties Required of Operators of Motor Vehicles For the Carriage of Passengers For Hire; 220 C.M.R. § 153 et seq., Certificates Running To The Registrar of Motor Vehicles; 220 C.M.R. § 155.00 et seq., Operation of Motor Vehicles For Hire Under A Certificate of Public Convenience and Necessity, Charter License, Special Service or School Service Permit; and 220 C.M.R. § 250.00 et seq., Transportation Division Practice.

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I. INTRODUCTION

By this Order, the Department of Public Utilities ("Department") adopts amendments to numerous Department regulations.[1] The revisions make the Department's regulations consistent with Chapter 19 of the Acts of 2007 ("Chapter 19").[2] In addition to amendments

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[1] 220 C.M.R.§ 1.00 et seq., Procedural Rules, 220 C.M.R. § 2.00 et seq., Adoption of Regulations, 220 C.M.R. § 5.00 et seq., Tariffs, Schedules and Contracts (Other Than Commercial Motor Vehicles), 220 C.M.R. § 6.00 et seq., Standard Cost of Gas Adjustment Clause, 220 C.M.R. § 7.00 et seq., Residential and Commercial Energy Conservation Service Program Cost Recovery, 220 C.M.R. 8.00 et seq., Sales of Electricity By Qualifying Facilities and On-Site Generating Facilities To Distribution Companies, and Sales of Electricity By Distribution Companies To Qualifying Facilities and On-Site Generating Facilities, 220 C.M.R. § 9.00 et seq., Cost Recovery For Major Electric Company Generation Investments, 220 C.M.R. § 11.00 et seq., Rules Governing Restructuring of the Electric Industry, 220 C.M.R. § 12.00 et seq., Standards of Conduct For Distribution Companies and Their Affiliates, 220 C.M.R. § 14.00 et seq., The Unbundling of Services Related To The Provision of Natural Gas, 220 C.M.R. § 25.00 et seq., Billing and Termination Procedures of the Department of Telecommunications and Energy, C.M.R. § 99.00 et seq., Procedures For the Determination and Enforcement of Violations of G.L. c. 82, § 40 ("Dig Safe"), 220 C.M.R. § 109.00 et seq., Design, Construction, Operation, and Maintenance of Intrastate Pipelines Operating In Excess of 200 PSIG, 220 C.M.R. § 126.00, Underground Electric Supply and Communications Lines 50,000 Volts and Below, 220 C.M.R. § 152.00 et seq., Sureties Required of Operators of Motor Vehicles For the Carriage of Passengers For Hire, 220 C.M.R. § 153 et seq., Certificates Running To The Registrar of Motor Vehicles, 220 C.M.R. § 155.00 et seq., Operation of Motor Vehicles For Hire Under A Certificate of Public Convenience and Necessity, Charter License, Special Service or School Service Permit, and 220 C.M.R. § 250.00 et seq., Transportation Division Practice.

[2] The rulemaking did not propose any changes related to telecommunications and cable. Chapter 19 divided the former Department of Telecommunications and Energy into two agencies: the Department of Public Utilities and the Department of Telecommunications and Cable ("DTC"). The Department anticipates a future rulemaking whereby the Department will rescind regulations relating to telecommunications and cable in coordination with the DTC implementing regulations addressing telecommunications and cable.

related to Chapter 19, the revisions correct typographical errors, make changes consistent with other statutory amendments and replace or delete outdated information.[3] The new regulations also include sections designed to codify long-standing Department practice with regard to ex parte communications and requests for confidential treatment of filings.[4]

On January 11, 2008, the Department published notice of the proposed rulemaking in the Massachusetts Register. On January 30, 2008, the Department held a public hearing to receive comments on the proposed changes. The following participants testified at the public hearing: Patricia Crowe, counsel for Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid ("National Grid"), Robert J. Munnelly Jr., counsel for the Retail Energy Supply Association ("RESA"), and Stephen Klionsky, counsel for Western Massachusetts Electric Company ("WMECo"). On January 30, 2008, the Department received written comments from the Massachusetts Attorney General, National Grid, RESA, NSTAR Electric Company and NSTAR Gas Company ("NSTAR"), the Cape Light Compact ("Compact"), and the GasNetworks Group ("GasNetworks"). On February 6, 2008, the Department received reply comments from the Attorney General, National Grid, NSTAR, and the Compact.

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[3] The Department will address any regulatory action required by the recently enacted Green Communities Act, Chapter 169 of the Acts of 2008 ("Green Communities Act"), in a future rulemaking.

[4] By this Order, the Department also closes a previous rulemaking proceeding, D.T.E. 04-121.

II. SUMMARY OF AMENDMENTS

The Department's amended regulation at 220 C.M.R. § 1.00 includes a provision that Commissioners, presiding officers and Department staff are prohibited from engaging in ex parte communications regarding substantive matters in an adjudicatory proceeding. The rule is consistent both with Department practice and with G.L. c. 30A, § 11(4), which prohibits the Department from relying on information other than record evidence in an adjudicatory proceeding.

220 C.M.R. § 1.00 also includes a new subsection regarding motions for confidential treatment of documents. The regulation details the written information that a party must provide when seeking protective treatment of documents in an adjudicatory proceeding. This new section is consistent with Department practice. Further, 220 C.M.R. § 1.10(4) contains a requirement that testimony and discovery responses be authenticated by an affidavit of the witness.

220 C.M.R. § 2.00 contains revisions that more accurately describe the rulemaking process consistent with requirements set by the Secretary of State. Revisions to 220 C.M.R. § 2.02 authorize the Department to initiate an action to adopt, amend, or repeal a regulation. This revision is consistent with long-standing Department practice.

Revisions to 220 C.M.R. § 2.02 also list the information that should be provided when petitioning the Department to open a rulemaking or issue an advisory ruling. The prior regulations provided inadequate guidance to a person petitioning for a regulation change or an advisory opinion.

Revisions to 220 C.M.R. § 5.00 include changing the name of the Department to "Department of Public Utilities," consistent with Chapter 19. The revision also deletes outdated sample formats for Notices of General Rate Increases to Customers of Gas, Electric, Water and Telephone. Section 6.00 is revised to correct a typographical error at 220 C.M.R. § 6.12(4).

Revisions to 220 C.M.R. § 7.00 update the schedule of annual budget submissions by companies, remove budget forms that the Department no longer uses, and update section numbering. Additionally, the Department has withdrawn its proposed definition for "municipal load aggregator" and has deleted references to that term.

Revisions to 220 C.M.R. § 9.00 correct a reference to Energy Facilities Siting Council so that it instead refers to "Energy Facilities Siting Board."

Revisions to 220 C.M.R. § 11.00 remove electric company names, correct a typographical error at § 11.07(4), make changes consistent with the conclusion of the standard offer generation service period, and establish a definition of "Basic Service," a term previously approved by the Department in Procurement of Default Service Power Supply for Residential and Small Commercial and Industrial Customers, D.T.E. 04-115-A (2005).

Revisions to 220 C.M.R. § 14.00 remove references to gas company names and correct a reference from "electricity" to "natural gas" in 220 C.M.R. § 14.04(4)(d).

The Department's regulation at 220 C.M.R. § 99.00 is revised to correct statutory cites to G.L. c. 82, § 40 ("Dig Safe") and typographical errors, while revisions to § 99.12 update civil penalties for violating the Dig Safe statute to ensure consistency with statutory changes to

G.L. c. 82, § 40. Additionally, 220 C.M.R. § 126.00 corrects a reference to the National Electric Safety Code in 220 C.M.R. § 126.31. Further, 220 C.M.R. § 152.00 deletes a reference to a bond that is no longer required, and 220 C.M.R. § 153.00 is rescinded in its entirety because it is obsolete. Additionally, 220 C.M.R. § 155.00 corrects a typographical error in a table. The Department's revisions to 220 C.M.R. § 250.00 insert the word "Oversight" into the Transportation Division title and correct the Department's address. Finally, in 220 C.M.R. §§ 8.00, 11.00, 12.00, 14.00, 25.00, 99.00, 109.00, and 155.00, we update the Department's name by replacing references to the former Department of Telecommunications and Energy with "Department of Public Utilities."

III. COMMENTS

A. Attorney General

1. Ex Parte Communications

The Attorney General recognizes that the Department's proposal to allow communication on "scheduling and other procedural matters" enables the Department to efficiently manage its cases and address issues that do not require all parties necessarily to be present (Attorney General Comments at 4). She argues, however, that the terms "scheduling and other procedural matters" and an exception for "information that is available in the public docket" are broad and subjective (id.). The Attorney General recommends that 220 C.M.R. § 1.02(9) should require disclosure of all ex parte contact, including "scheduling and other procedural matters" or "information that is available in the public docket." She contends that allowing ex parte communications in these circumstances may impact the due

process rights of all parties (id.). She proposes that in order to balance the Department's need to manage its cases and avoid subjective determinations of communications exempt from ex parte regulations, the hearing officer should document the content of such discussions and distribute them to each party in the service list within twenty-four hours (id.; Attorney General Reply Comments at 4-5).

Additionally, the Attorney General argues that the restrictions on ex parte communications should attach as soon as that communication may affect the outcome of a proceeding, whether pending or not (Attorney General Comments at 4; Attorney General Reply Comments at 4). She points out that the primary reason that ex parte communications in an adjudicatory proceeding are forbidden and agency adjudication is limited to the basis of record evidence is to ensure fairness in the litigation process (Attorney General Comments at 2, citing 5 U.S.C. § 557(c)(2005); Professional Air Traffic Controllers Organization (PATCO) v. Federal Labor Relations Authority (FLRA), 685 F.2d 547, 563-64 (D.C. Cir. 1982)).

The Attorney General notes that, similar to the Department's proposed ex parte rule, the Massachusetts Standard Adjudicatory Rules of Practice and Procedure found in 801 C.M.R. § 1.03(6)(a)4 (hereinafter, "Standard Adjudicatory Rules"), also prohibit ex parte communications at the time when an adjudicatory proceeding is initiated (Attorney General Comments at 4, citing Rulemaking at 220 C.M.R. § 1.02(9); 801 C.M.R. § 1.03(6)(a)4 (2007)). She argues, however, that the Standard Adjudicatory Rules make an exception to this time frame in the event that the person responsible for communication knows

or reasonably should know that the adjudicatory proceeding will be initiated, in which case the prohibitions shall apply beginning at the time that such person has actual or constructive knowledge of this fact (id. at 5, citing 801 C.M.R. § 1.03(6)(a) 4 (2007)). She recommends that, at a minimum, the Department adopt a similar provision and also that it provide notice and disclosure for meetings with parties or potential parties that involve subject matter under the Department's jurisdiction (id. at 7).

2. Other proposed regulations

The Attorney General also cautions against expanding 220 C.M.R. § 2.02 to allow any interested person the ability to petition the Department to issue an advisory ruling. She instead recommends maintaining current precedent regarding advisory opinions (id. at 8). She argues that the Department has historically declined to issue advisory opinions and prefers instead to construe its statute and regulations in specific factual settings (id., citing Massachusetts-American Water Company, D.P.U. 95-41, at 7 (1995)).

Additionally, the Attorney General contends that the proposed changes to 220 C.M.R. § 11.04(10)(e) would remove the provision that the amount and method of recovery of bad debt expenses that each distribution company may recover be established in a general rate case (id. at 9). She therefore recommends that the words "in a general rate case" remain where those words appear in 220 C.M.R.§ 11.04(10)(e), Billing & Payment (id.).

She further proposes that the Department maintain conformance with G.L. c. 164, § 5A, which requires that the name of a corporation subject to G.L. c. 164 contain either the words "gas company" or "electric company," when revising the names of

any gas or electric light company referred to in the Department's regulations (id. at 10). The Attorney General recommends that the Department's Rulemaking be expanded to include a provision for electronic service of process and establishing definitive time frames and deadlines by which certain motions and Department rulings must be made (id.).

The Attorney General recommends that the Department maintain its efforts to codify its existing policy with respect to protective orders for confidential materials (Attorney General Reply Comments at 2). She supports the Department's rule under 220 C.M.R. § 1.10(4) to require prepared written testimony and discovery responses to be authenticated by an affidavit of the witness and encourages the Department to reject comments that the codification of the rule concerning protective orders for confidential materials will create a cumbersome process for parties to provide discovery responses and slow the processing of responses to information requests (id. at 1-2).

The Attorney General also supports the Department's change to 220 C.M.R. § 2.02 that requires that petitions to adopt, amend, or repeal a regulation and petitions for an advisory opinion be accompanied by an affidavit or attestation that all of the facts submitted by any interested party or his or her attorney in are true to the best of the party's knowledge (id. at 3). Further, the Attorney General suggests that 220 C.M.R. §§ 1.10(4) and 2.02 include notice to the witness of the penalties for providing false information to the Department (id. at 1, 3).

Additionally, the Attorney General opposes RESA's proposal that distribution companies be required to purchase receivables of residential and small C&I customers (id. at 3). She also argues that competitive suppliers should not be released from regulations

regarding billing, security deposits, late fees, shut-offs, and information disclosure labeling (id. at 4).

B. The Compact

The Compact recommends that the Department delete all references to "municipal load aggregators" in 220 C.M.R. §§ 7.01, 7.02, 7.03, 7.05, 7.08, 7.09, 7.10 and 7.11, the Department's regulations on Residential and Commercial Energy Conservation Service Program Cost Recovery (Compact Comments at 4). The Compact asserts that the Department has historically addressed municipal load aggregators' Residential Conservation Services ("RCS") programs separately from utility RCS programs (id.; Compact Reply Comments at 2). The Compact notes that, pursuant to G.L. c. 164 App. § 2-7, utilities are required to annually submit their RCS operating budgets to the Department for approval (Compact Comments at 4). The Compact that notes although it is not a "utility" under G.L. c. 164 App. § 2-1 or § 2-7, it has been and continues to be committed to cooperating with Department RCS policies and procedures to the extent applicable, due to its role as a municipal aggregator (Compact Comments at 4; Compact Reply Comments at 2). The Compact emphasizes, however, that it is not a "utility" for purposes of the RCS program, and also points out that, as a practical matter, it does not maintain regulatory account numbers or books of account consistent with the practices of utilities and does not believe it is required to do so (Compact Comments at 5; Compact Reply Comments at 2). The Compact argues that the term "municipal load aggregator" should be deleted to avoid inconsistency and confusion (Compact Comments at 5).

C. GasNetworks

GasNetworks proposes several changes to sections of the regulations addressing RCS Programs. GasNetworks requests that the language in 220 C.M.R. § 7.05(2) regarding the filing of rate adjustments be changed from "No later than November 1. . ." to "No later than November 15. . ." (GasNetworks Comments at 2). GasNetworks represents that its members still plan to make their RCS annual budget filings on or before November 1, as required by 220 C.M.R. § 7.05(1), but that allowing extra time to file rate adjustments would comport with present practice and ensure that members of GasNetworks have additional time to assemble detailed and accurate RCS rate adjustment filings (id.).

GasNetworks also recommends that the fourth sentence of 220 C.M.R. § 7.06 be revised to read: "The charge shall be calculated on the amount of those expenses, plus any under/over collection from the previous year, divided by the total number of firm ratepayers of such utility." GasNetworks contends that this will more accurately reflect the mechanics of the actual calculation of the RCS surcharge (id. at 3).

GasNetworks proposes deleting the last sentence of 220 C.M.R. § 7.07 with respect to scheduling the distribution of RCS Program inserts (id.). GasNetworks states that the scheduling of such distribution is adequately addressed earlier in the section (id.). GasNetworks also argues that the last sentence of this provision refers to coordination with the filing of a "Utility Implementation Plan," although the RCS program has evolved so that these plans are not filed on an annual basis with the Division of Energy Resources ("DOER"), but that DOER has instead moved to a coalition action plan model (id.).

GasNetworks further recommends changing references to "Department" and "Department's secretary" in 220 C.M.R. § 7.09 and inserting in lieu thereof "DOER" (id.). GasNetworks also recommends changing the third sentence of 220 C.M.R. § 7.09 to read: "A gas utility annual report shall also be filed with the DOER each year on or before March 31 for the previous year's operation and shall contain the same information, on an annual basis, as required in the quarterly reports" (id. at 3-4). These changes will provide consistency with the current reporting regimen (id. at 4). GasNetworks also notes that moving the date for annual reports from January 30 to March 31 each year will ensure that actual data is complete and accurate (id.).

D. National Grid

National Grid proposes that, in reference to 220 C.M.R § 1.04(5)(e)4, Motion for Protection from Public Disclosure, the Department change the word "statutory" to "legal" to allow for an exemption that may not result from statute but that is nonetheless permitted (National Grid Comments at 2). National Grid also suggests that the unredacted copy of the material be sent directly to the hearing officer, rather than being filed directly with the Secretary of the Department because this codifies current practice (id.).

Additionally, National Grid recommends that the Department use the term "Public Aggregator" rather than "Municipal Load Aggregator" in 220 C.M.R. § 7.00, the regulations on RCS Program Cost Recovery. This change would be consistent with 220 C.M.R. § 11.00 et seq., which it states uses the term "Public Aggregator" to refer to the same concept (id.). National Grid recommends using the definition provided in 220 C.M.R. § 11.02

to provide consistency throughout the regulation (id.). Further, National Grid also proposes providing a definition for the Department of Energy Resources and Residential Energy Conservation Services, rather than embedding those definitions within the definition of State Plan (id. at 2-3).

National Grid also suggests explicitly stating in 220 C.M.R. § 7.03, Revenue Treatment, that the requirement that sub accounts include all revenue attributed to an adjustment in rates set forth in 220 C.M.R. § 7.06 refers to gas utilities (id. at 3). In reference to 220 C.M.R. § 7.05, Annual Budget, National Grid proposes further clarification regarding the way that gas and electric companies collect funds for RCS (id.). National Grid recommends a second paragraph in 220 C.M.R. § 7.06 to acknowledge that electric companies receive their funds through the energy efficiency charge mandated by G.L. c. 25, § 19 (id.). National Grid proposes a final sentence in this section that would read as follows: "Each electric utility and public aggregator shall collect from its ratepayers the approved operating budget for the year as part of the energy efficiency charge contained in M.G.L. c. 25, § 19" (id.).

With respect to 220 C.M.R. § 7.05(2) as it relates to the filing of rate adjustments, National Grid requests that the language in the first sentence of that section be changed from "No later than November 1 . . ." to "No later than November 15 . . ." (id.). National Grid represents that it plans to continue making RCS filings on or about November 1, but suggests that allowing for filing of rate adjustments no later than November 15 would comport with the present practice for affiliate gas utilities preparing more than one filing to have additional time

to ensure detailed and accurate rate adjustment filings (id. at 3-4; Tr. at 10). National Grid noted that it is the only utility with three gas companies, and that the practice of filing rate adjustments no later than November 15 is important given the number of companies owned by National Grid (Tr. at 10).

National Grid recommends, to comport with cost recovery for gas utilities, that the first sentence of 220 C.M.R. § 7.06 be changed so that it begins with "Each gas utility . . ." rather than "Each utility . . . " (National Grid Comments at 4). National Grid also requests that the fourth sentence of this section be revised so that it reflects how the RCS surcharge is actually calculated. National Grid suggests that the changed sentence read: "The charge shall be calculated on the amount of those expenses, plus any under/over collection from the previous year, divided by the total number of firm ratepayers of such utility" (id.).

Additionally, National Grid proposes that the Department delete the last sentence of 220 C.M.R. § 7.07 with respect to scheduling the distribution of RCS program inserts, and states that such scheduling is adequately addressed earlier in this section (id.). Additionally, utility implementation plans, referenced in that sentence, are no longer filed annually with DOER; instead, DOER has moved to a coalition action plan, so references to the utility implementation plan would be confusing (id.).

With respect to 220 C.M.R. § 7.09, Quarterly Reports, National Grid states that it understands that annual RCS reports would be filed with DOER rather than the Department, but asserts that it could also provide the Department with a quarterly filing (id. at 5). National Grid requests that, for gas utilities, the report be filed on March 31 instead of January to allow

sufficient time to close annual books and obtain information after the end of the year from third-party vendors (id.). National Grid also asserts that filing a separate annual report for electric companies would be duplicative and unnecessary because those companies also file energy efficiency reports that include residential information and program specific RCS information (id.).

As to the Annual Reconciliation discussed in 220 C.M.R. § 7.10, National Grid recommends adding two words to the third sentence so that not only a surcharge is contemplated, but also a credit (id.). National Grid also recommends deleting the last sentence and claims it is confusing in light of energy efficiency funding and program structure on the electric side (id.).

National Grid also supports WMECo's argument that certain provisions within 220 C.M.R. § 7.00 regarding RCS apply differently to gas and electric utilities, but the regulations do not make that distinction (Tr. at 5-7, 9-10).

National Grid recommends that the definition of National Grid found in 220 C.M.R. § 11.01(2)(b) be revised to read "Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid" (National Grid Comments at 6).

National Grid goes on to propose that, in 220 C.M.R. § 11.02, General Definitions, the Department use the term "Basic Service" rather than "Basic Generation Service" (id.). Alternatively, National Grid states it would comply with the regulations as written, but would continue to call the service "basic service" publicly (id.).

Additionally, National Grid recommends changing the definition of Independent System Operator for consistency with the commencement of the New England Regional Transmission Organization on February 1, 2005. National Grid suggests that for Independent System Operator of ISO, the following be inserted: "means ISO New England, Inc. authorized by the Federal Energy Regulatory Commission to exercise, for New England, the functions required pursuant to FERC Order 2000 and any of its successor regulations, and any successor organization, including but not limited to, a Regional Transmission Organization" (id. at 6-7).

National Grid recommends that the definition of Renewable Resources be amended so that the word "New York" is replaced with words "adjacent control areas" because the Renewable Portfolio Standard allows resources to be obtained from New York, Canada, and Northern Maine (id. at 7). National Grid also recommends that references to Standard Offer Generation service, which ended on February 28, 2005, be deleted (id.). National Grid further recommends deleting the definition of "Unit Contract," a term not found elsewhere in the regulation (id.).

National Grid points out that the Default/Basic Generation Service language in 220 C.M.R. § 11.04(9)(c)(2)(b) does not reflect the provision by the Department for a three-month rate for large industrial customers pursuant to its Order in D.T.E. 02-40-C (id.).

In regards to 220 C.M.R. § 11.05(2)(b)(14), Information Filing Requirements, National Grid recommends a change to the information requirements that electricity suppliers and brokers file with the Department as part of their license regulation. Rather than requiring that a competitive supplier document that it is a NEPOOL member or has a contractual

arrangement with a NEPOOL participant, National Grid recommends updating this section to reflect ISO's latest FERC Tariff, which sets forth the current requirement that a competitive supplier document that it has a market participant service agreement with the ISO or that it has a contractual arrangement with a market participant (id.).

National Grid recommends including in 220 C.M.R. § 11.05(4)(c), Affirmative Choice, the electronic verification of customer authorization (id. at 8). National Grid also states that RESA's comments relating to changes to 220 C.M.R. § 11.00 are beyond the scope of what the Department contemplated in this proceeding (National Grid Reply Comments at 1-2; Tr. at 18). National Grid requests that RESA's substantive changes to 220 C.M.R. § 11.00 not be considered in this docket. Alternatively, if the Department deems that such changes be addressed, National Grid requests that those changes be taken up in another proceeding or that National Grid and other interested entities be provided additional time to comment on those substantive proposals (National Grid Reply Comments at 2).

National Grid also recommends that the Department clarify 220 C.M.R. § 12.03(9). The current provision states that "[a] Distribution Company shall not release proprietary customer information to an Affiliate without the prior written authorization of the customer." (id.). National Grid argues that the rule as written appears to be very broad and would make it impracticable for a distribution company to use a non-competitive affiliate for such services as billing, engineering, accounting, rate design, legal and property management. National Grid recommends that the revised provision read as follows: "[a] Distribution Company shall not

release proprietary customer information to a Competitive Affiliate without the prior written authorization of the customer" (id.).

National Grid also supports WMECo's comments that a requestor of an advisory opinion should be provided a definite answer as to whether they will be provided such an opinion (Tr. at 11). National Grid also states that authentication of discovery responses would not be needed in cases where there will be adjudicatory hearings before the Department (id. at 18).

E. NSTAR

NSTAR contends that the proposed changes to 220 C.M.R. § 1.04(5)(e), requiring a contemporaneous written motion seeking a protective order with submission of such confidential materials, would create a very cumbersome process for parties to provide discovery responses and would slow the processing of responses to information requests (NSTAR Comments at 1-2). NSTAR recommends that the Department allow a party to file a simple motion requesting confidential treatment with each information response for which confidential treatment is sought and, upon the close of discovery, the party could submit a comprehensive supplemental confidential treatment motion (id. at 2). NSTAR also recommends that the regulation on confidential treatment distinguish between non-privileged yet confidential material, and "privileged" information, which it argues should not be subject to the requirement that unredacted portions of confidential materials be submitted to the Department (id. at 3).

As to specific requirements of a motion seeking confidential treatment, NSTAR contends that the word "proof" is problematic in 220 C.M.R. § 1.04(5)(e)(4), which requires, "the reasons for the claim of confidentiality, including proof that a statutory exemption to public disclosure applies" (id.). Similarly, NSTAR contends that the word "proof" is also problematic in 220 C.M.R. § 1.04(5)(e)(5), which requires for a motion "proof of harm of public disclosure" (id.). NSTAR argues that it is unclear what is meant by "proof" and recommends replacing the word "proof" with "explanation" (id.).

NSTAR also states that the proposed 220 C.M.R. § 1.04(5)(e)(6), requiring disclosure as to the extent to which the record or its concerns have been disclosed to other persons or federal, state and local agencies, including the status of any requests for confidentiality, is too broad (id. at 4). NSTAR argues that the number of entities with knowledge of confidential information could be extensive (id.). Instead, NSTAR proposes that the requirement should indicate that the materials for which confidential treatment is sought are not customarily available in the public domain, nor that in this case has the information been made available to the public by another federal, state or local agency (id.).

Further, NSTAR contends that the certification requirement in 220 C.M.R. § 1.04(5)(e)(7), requiring "a certification to the best of the moving party's knowledge, information and belief, that the information is not customarily available in the public domain," is reasonable so long as that certification is construed as being made by the party requesting confidential treatment (id.). NSTAR argues that this requirement should not be construed as requiring certification by a party's attorney because the attorney may not have first-hand

knowledge of the workings in a competitive market to know to what extent such information may be known by others (id.).

NSTAR also contends that the regulation in 220 C.M.R. § 1.10(4), requiring all written testimony and discovery responses be authenticated by an affidavit of a witness, will make the discovery process more cumbersome and introduce additional delays in the discovery process (id.). NSTAR contends that because authentication generally occurs at the first hearing when the witness adopts his or her testimony, it would be more efficient to have a written authentication requirement after the close of discovery and/or at the evidentiary hearings conducted by the Department (id. at 4-5).

NSTAR also submits that RESA's recommendations regarding competitive suppliers go far beyond the scope of this rulemaking (NSTAR Reply Comments at 1-2). NSTAR asks that if the Department wishes to address those issues, it do so in a separate docket where interested parties can fully explore and argue the issues (id. at 2).

NSTAR contends that the Attorney General's recommendation that the prohibition on ex parte communications be extended to include communications before a filing is made at the Department, triggered whenever a person responsible for the communication knows or reasonably should know that an adjudicatory proceeding will be initiated on the subject matter of the communication, are too vague and broad, and thus unworkable (id.). NSTAR argues that it would be difficult to know in some instances when a communication will later be subject to an adjudicatory proceeding at the Department (id.). Additionally, NSTAR asserts that various communications of a long-term nature, such as those regarding gas supply or capital

investments, could fall under the prohibition because of the mere possibility that one day, possibly years later, it may become the subject of a Department adjudicatory proceeding (id.). NSTAR argues that the Attorney General's rule would result in a chilling effect on the free exchange of information between parties and the Department outside of any particular case, and could impede the Department's ability to become better informed as to challenges existing in the rapidly evolving world of public utilities (id. at 2-3). Finally, NSTAR asserts that the Attorney General's recommendation that any ex parte contact, including those of a procedural nature, be disclosed in writing to all participants would be unnecessary and time-consuming (id. at 3). Instead, NSTAR recommends that the Department adopt the proposed ex parte regulation (id.).

F. RESA

RESA recommends many substantive changes to 220 C.M.R. § 11.00, Electric Restructuring Rules. RESA recommends deleting outdated rules governing the provision of standard offer generation service, deleting portions of the Transition Cost Recovery regulations in 220 C.M.R. § 11.03 that appear to be outdated, and requiring distribution companies to purchase the receivables of residential and small commercial C&I customers served by competitive suppliers (RESA Comments at 1-2; Tr. at 12-13). RESA also recommends restructuring rules governing competitive suppliers include modifying regulations governing billing, security deposits, and late fees that apply to suppliers serving residential customers, revising rules regarding termination of services to residential customers, amending condominium rate regulations pertaining to competitive suppliers, amending regulations

pertaining to security deposits for C&I customers, revising information disclosure label and distribution requirements for competitive suppliers, updating licensing application regulations for suppliers, and updating regulations pertaining to dispute resolution procedures that apply to C&I customers (RESA Comments at 2-8; Tr. at 13).

RESA proposes that 220 C.M.R. § 1.00 also codify Department policies and practices for electronic filing and service and for electronic distribution of Department notices, pleadings, rulings and final Orders (RESA Comments at 8; Tr. at 14). RESA also contends that the proposed changes to 220 C.M.R. § 1.10(4) that require authentication by affidavit of testimony and discovery responses are unnecessarily burdensome and conflict with long-standing Department practice that pre-filed testimony and discovery responses are adopted by the witness under oath during an evidentiary hearing (RESA Comments at 8; Tr. at 14, 16). RESA argues that affidavits should be required only when the parties do not authenticate the testimony and responses in other ways, such as when a issues are decided exclusively on the pleadings (RESA Comments at 8-9).

Additionally, RESA argues that 220 C.M.R. § 1.11(5), which requires that briefs contain an index of cases and associated page references, is ignored in practice by virtually all parties before the Department (id. at 9). RESA asserts that, although useful in large gas or electric rate cases, it is an unnecessary and costly burden that contributes little value to the Department's decision-making process (id.).

Further, RESA argues that Appendix 1 to 220 C.M.R. § 1.03 may be read to require that counsel file a separate notice of appearance. RESA states this rule is not followed in

practice and is usually unnecessary as counsel is typically identified in the signature blocks of intervention pleadings (id.; Tr. at 22).

Finally, RESA also recommends that the Department not delete the requirement in 220 C.M.R. § 2.05(4) that emergency regulations contain an effective date (RESA Comments at 9).

G. WMECo

WMECo asserts that several sections of 220 C.M.R. § 7.05 apply more to gas companies than electric companies, and that the proposed regulation does not reflect current statutory circumstances (Tr. at 5). WMECo provides several examples, including that the requirement in 220 C.M.R. § 7.05(2), which indicates that a utility shall file an application for an adjustment in its rates to cover RCS expenses, does not apply to electric companies because they charge a set statutory rate for such services (id.). WMECo also argues that 220 C.M.R. § 7.06 is not applicable to electric companies, in that it refers to firm ratepayers, a term not generally applied to electric companies (id. at 6). Further, WMECo points out that 220 C.M.R. § 7.09 also does not apply to electric companies, in that it refers to quarterly and annual reports made by gas companies (id. at 6-7).

Additionally, WMECo argues that 220 C.M.R. § 2.08 should for the sake of finality contain a requirement that the Department advise a requestor whether it intends to provide a requestor with an advisory ruling (id.. at 8). Finally, WMECo concurs with RESA's comments on the inconvenience of having testimony be authenticated by an affidavit, and added that the Department should explain the meaning of authentication (id. at 17). WMECo

states that it believed RESA's proposals regarding 220 C.M.R. § 11.00 were likely beyond the scope of this rulemaking (id. at 17-18).

IV. ANALYSIS AND FINDINGS

A. Ex Parte Communications

The Department's regulation at 220 C.M.R. § 1.00 includes a new section providing that Commissioners, presiding officers and Department staff are prohibited from engaging in ex parte communications regarding substantive matters in an adjudicatory proceeding. The ex parte rules play a critical role in protecting the fairness of Commission adjudicatory proceedings by ensuring that decisions are not influenced by impermissible off-the-record communications. The Department determined to codify its longstanding practice with regard to ex parte communications in order to ensure public understanding of these requirements as well as reinforce the importance of these restrictions.

After further consideration, the Department has revised 220 C.M.R. § 1.02(9)(b) as follows:

> (b) Communications not prohibited by 220 C.M.R. 1.02(9)(a) include:
>
> 1. Communication concerning scheduling, administrative, and other procedural matters; and
> 2. Communications between a party and assigned settlement intervention staff for the purpose of producing a settlement, or communications between a party and staff assigned to conduct alternative dispute resolution or mediation proceedings.

The Department has deleted the clause "as well as information that is available in the public docket" from the initial proposed provision in subsection (b)(1) above. The Department made this revision to be more specific about the types of communication that are permissible under

the rule. Additionally, the Department has added the word "administrative" to this provision to clarify that communication concerning administrative matters is permissible. The remainder of the revised rule is consistent both with Department practice and with G.L. c. 30A, § 11(4), prohibiting the Department from relying on information other than record evidence in an adjudicatory proceeding.

The Department rejects the Attorney General's proposed ex parte rule. First, the Standard Adjudicatory Rules and federal cases cited by the Attorney General are inapplicable in proceedings initiated under the Massachusetts Administrative Procedures Act, codified in G.L. c. 30A. Additionally, the Attorney General's argument that ex parte restrictions should attach as soon as a communication may affect the outcome of a proceeding, whether pending or not, is too broad and unworkable. Rather, the Department's responsibility to provide information to the public, to respond to consumer inquiries, and our general oversight obligations, on occasion require communication with companies and other entities regarding matters within and related to our jurisdictional roles, absent a docketed adjudicatory proceeding. Applying the Attorney General's proposed rule would lead to subjective judgments about when a policy or regulatory matter might lead to an adjudicatory proceeding, would have a chilling effect on the Department's ability to regulate utilities subject to its jurisdiction, and would ultimately, given the subjectivity involved in such judgments, be unenforceable.

The Department recently rejected similar arguments raised by the Attorney General in Bay State Gas Company, D.P.U. 07-89 (2008). In that proceeding, the Hearing Officer

concluded that there was no statute or rule that required the Department to disclose the contents of two informational meetings that took place between Bay State Gas Company ("Bay State") and Department personnel prior to Bay State filing a rate case, and further noted that such meetings advanced the Department's understanding of the financial condition of a jurisdictional utility. D.P.U. 07-89, at 5 (Hearing Officer Ruling on Motion of the Attorney General) (April 2, 2008)).

Further, the Department declines to accept the Attorney General's suggestion that the Department adopt a notice and disclosure requirement for meetings with parties or potential parties that involve a matter under the subject of its jurisdiction. Such a requirement would be administratively burdensome and would similarly hinder the Department's regulatory role over jurisdictional utilities by subjecting permissible communications to heightened procedural rules.

The Department also concludes that the Attorney General's suggestion that the hearing officer summarize and distribute the contents of communications regarding scheduling or procedural matters would be too administratively burdensome. Requiring hearing officers to document communications that are not prohibited would be unnecessarily onerous, inefficient, and would make it difficult for hearing officers to manage and respond to purely procedural and administrative inquiries. Moreover, we note that hearing officers already routinely request

that parties file written motions that memorialize telephone inquiries or conversations.

B. Protective Orders for Confidential Treatment

The Department's addition of 220 C.M.R. § 1.04(5)(e) requires that a Motion for Protection from Public Disclosure be submitted at the time a moving party seeks confidential treatment for a record. The regulation codifies current Department practice and ensures administrative efficiency. The Department accepts National Grid's suggestion that the unredacted copy of the confidential treatment which the party is seeking be sent to the Hearing Officer rather than the Department, and therefore adopts such recommendation.

The rule initially proposed by the Department also required that the party moving for a protective order shall provide "the reasons for the claim of confidentiality, including proof that a statutory exemption to public disclosure applies," and "proof of the harm of public disclosure." 220 C.M.R. § 1.04(5)(e) 4 and 5. After further consideration, the Department has deleted the term "statutory" from 220 C.M.R. § 1.04(5)(e)4, so that the moving party must provide proof that an "exemption to public disclosure applies." Additionally, NSTAR commented that the term "proof" was problematic in these provisions; however, the Department concludes that the term "proof" in both clauses is consistent with Department precedent. See, e.g., NSTAR Electric Company, D.P.U. 07-64, at 7, Hearing Officer Ruling (November 19, 2007) (company met its burden of demonstrating harm in publicly disclosing contract price terms); Boston Edison Company, D.T.E. 97-95, at 15, Interlocutory Order (1998) (nondisclosure agreements alone insufficient to warrant protective treatment); Bay State Gas Company, D.P.U. 94-16, at 6 (1994) (supplier names denied protection); Standard of

Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (identity of customers may be denied protection absent proof of competitively sensitive nature).

Further, the Department concludes that the regulation found in 220 C.M.R. § 1.04(5)(e)(6), requiring disclosure of the extent to which the record or its concerns have been disclosed to other persons or federal, state and local agencies, including the status of any requests for confidentiality, is not overly broad (see NSTAR Comments at 4). General Law c. 25, § 5D states that "[t]here shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection." The Department has required parties seeking confidential treatment of information to meet their statutorily mandated burden of demonstrating the need for such treatment. See Bay State Gas Company, 06-84 (Hearing Officer Ruling on Motions for Protective Treatment at 5-6) (July 27, 2007); Fitchburg Gas and Electric Light Company, D.P.U. 07-37, at 7-8 (2007). Although the number of entities with knowledge of confidential information could be extensive, the party must carry its burden and demonstrate that the information for which it is seeking confidential treatment is not already a matter of public record.

Further, the Department adopts the certification requirement in 220 C.M.R. § 1.04(5)(e)(7), requiring "a certification to the best of the moving party's knowledge, information and belief, that the information is not customarily available in the public domain." The Department declines to adopt NSTAR's proposal that the regulation distinguish between non-privileged yet confidential material and "privileged" information such as attorney-client

information which NSTAR contends should not be subject to the requirement that an unredacted copy be filed with the Department (see NSTAR Comments at 3).

C. Affidavits Authenticating Witness Testimony and Discovery Responses

The Department's regulation at 220 C.M.R. § 1.10(4) requires that written testimony and discovery responses be authenticated by affidavit. Several commenters expressed concern that requiring these affidavits is unnecessary in instances in which an adjudicatory hearing will take place, given that witnesses adopt testimony and discovery under oath in such hearings (see Tr. at 14, 16-18; NSTAR Comments at 4-5; RESA Comments at 8-9). Additionally, NSTAR stated that such requirements would be burdensome and would slow down the discovery process (NSTAR Comments at 4). NSTAR, National Grid, and RESA argue that it is appropriate or more efficient to have written authentication after the close of discovery and/or at the evidentiary hearings conducted by the Department (NSTAR Comments at 4-5; RESA Comments at 8-9; Tr. at 18).

The Department has concluded that affidavits authenticating both written testimony and discovery responses are needed to ensure that the Department may properly rely upon them as record evidence. See 220 C.M.R. § 1.10. Many Department proceedings are notice and comment proceedings in which there is no evidentiary hearing and opportunity for a witness to formally adopt testimony and discovery. Additionally, it is not always clear which proceedings will be purely paper proceedings and which might result in an evidentiary hearing. Thus, to ensure that all testimony and discovery is properly authenticated, the Department concludes that it is most administratively efficient to adopt a requirement that authenticating

affidavits be submitted for all written testimony and all discovery responses, although, as discussed below, the regulation will provide the hearing officer discretion to determine a schedule for filing such affidavits. The Department is persuaded that this is the best practice, and notes that the Federal Energy Regulatory Commission requires that written testimony be accompanied by an authenticating affidavit. 18 C.F.R. § 385.507(d). The Department declines to adopt the Attorney General's recommendation that the provision at 220 C.M.R. §1.10(4) include a notice of penalties for false swearing.

In response to concerns that it would be burdensome for parties to submit an affidavit authenticating discovery responses contemporaneously with those responses, the Department will provide the hearing officer with discretion as to when the authenticating affidavit must be submitted. Thus, the Department has revised 220 C.M.R. § 1.10(4) to the following: "Unless otherwise directed by the Hearing Officer, prepared written testimony and discovery responses must be authenticated by an affidavit of the witness at the time of filing." The Department anticipates that in cases in which there will clearly be an evidentiary hearing, the hearing officer will issue ground rules or otherwise direct parties that written testimony will be adopted at the evidentiary hearing or, if the sponsoring witness is unavailable at the hearing, by affidavit submitted at a date prior to that hearing, and that affidavits authenticating discovery responses will be filed with the Department either at the close of discovery or at the evidentiary hearing. Moreover, in all cases parties are free to seek an alternative schedule for filing affidavits.

D. Other Proposed Changes to 220 C.M.R. § 1.00, et. seq.

The Attorney General recommended that the Department Rulemaking be expanded to include a provision for electronic service of process and provide definitive time frames for certain motions and Department Rulings (Attorney General Comments at 10). RESA also suggested that this rulemaking adopt a provision to provide for electronic service (RESA Comments at 8). Such an amendment was not noticed in this rulemaking proceeding and is, as such, beyond the scope of this rulemaking. The Department will consider initiating a separate rulemaking to provide for an electronic service provision. The Department declines, however, to adopt specific time frames for responding to certain motions and providing rulings. The Attorney General's comment is not clear as to which motions or rulings she is referring, and the Department did not provide notice of such a change in the order opening this rulemaking.

The Department declines to adopt RESA's suggestions that the Department delete the requirement in 220 C.M.R. § 1.11(5), which requires that briefs contain an index of cases and associated page references. Additionally, as to RESA's concern that Appendix 1 to 220 C.M.R. § 1.15 may be read to require that counsel file a separate notice of appearance, the Department notes that 220 C.M.R. § 1.02(7) does in fact require counsel to file an appearance with the Department. The Department takes this opportunity to underscore the importance of such a filing.

The Department has also revised the heading in 220 C.M.R. § 1.07 from "Decisions" to "Quorum; Tentative or Proposed Decisions." The Department adopts the remaining revisions to 220 C.M.R. § 1.00 which change references from the "Commercial Motor

Vehicle Division" to the "Transportation Oversight Division," correct the Department's address, and make other stylistic language changes.

E. 220 C.M.R. § 2.00 et seq., Adoption of Regulations

The Department received a few comments on other proposed revisions to 220 C.M.R. § 2.00 et seq.. With regard to the Attorney General's caution against expanding 220 C.M.R. § 2.02 to allow any interested person the ability to petition the Department to issue an advisory ruling, the Department is sensitive to this concern, but concludes that the revised provision is not expanding the circumstances in which the Department will render an advisory ruling. Indeed, the Department is deleting the words "any interested person or his attorney" from the introduction in the previous regulation that describes who may request an advisory ruling. See 220 C.M.R. § 2.08. The Department also declines to add to the proposed provision a specific time-frame in which the Department will give notice that it intends to issue an advisory ruling.

As to the effective date in which emergency regulations in 220 C.M.R. § 2.05(4) take effect, the Department has adopted language that is consistent with G.L. c. 30A. The Department adopts the proposed revisions.

F. 220 C.M.R. § 5.00 et seq.

The Department received no comments on its proposed revisions to 220 C.M.R. § 5.00, which update agency names, updates to whom transmittal letters should be sent, and delete outdated sample formats for Notices of General Rate Increases to Customers of Gas, Electric, Water and Telephone. The Department adopts the proposed revisions.

G. 220 C.M.R. § 6.00 et seq.

The Department also received no relevant comments on this section. The Department adopts the proposed revision to 220 C.M.R. § 6.00, which corrects a typographical error at 220 C.M.R. § 6.12(4).

H. 220 C.M.R. § 7.00 et seq.

The Department proposed limited changes to this section, including inserting the term municipal load aggregator and a definition for that term, as well as updating the schedule of annual budget submissions by companies and deleting budget forms no longer used by the Department.

The Compact argued that many provisions of 220 C.M.R. § 7.00 et seq. are not applicable to municipal load aggregators, although the Compact notes that it cooperates with Department RCS policies and procedures to the extent applicable (Compact Comments at 4). We choose not to address the issue of whether this regulation applies to municipal load aggregators at this time.[5] The Department removes the proposed definition and references to municipal load aggregators, but adopts the remaining revisions.

Additionally, pursuant to the recently enacted Green Communities Act, Chapter 169 of the Acts of 2008 ("Green Communities Act"), DOER's agency name changed from the "Division of Energy Resources" to the "Department of Energy Resources." Therefore, the

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[5] Similarly, the Department declines to adopt National Grid's suggested term "public aggregator" in place of "municipal load aggregator."

Department is amending all references to the agency found in 220 C.M.R. § 7.00 et. seq. as well as 220 C.M.R. § 11.06(6)(e)(2) to reflect that change.

National Grid, the Compact, and GasNetworks all provided extensive comments proposing further revisions to this section of the regulation. As a result of the Green Communities Act, the Department may choose to address the RCS process through a separate rulemaking proceeding. The Department concludes that it is most efficient to leave the remainder of this section as is at this time.

I. 220 C.M.R. § 8.00 et seq.

The Department received no comments on this section, and adopts the proposed revision to 220 C.M.R. § 8.00, which updates the Department's name.

J. 220 C.M.R. § 9.00 et seq.

The Department received no comments on this section, and corrects a reference at 220 C.M.R. § 9.04 from the Energy Facilities Siting Council to the Energy Facilities Siting Board.

K. 220 C.M.R. § 11.00 et seq.

National Grid proposed several changes to definitions found in 220 C.M.R. § 11.02. The Department concurs with National Grid's suggestion to use the term "Basic Service," rather than "Basic Generation Service," a term originally proposed by the Department, given that the term Basic Service has become the standard term used in the electric industry and is also referred to as such in D.T.E. 04-115-A.

National Grid also recommended that the definition for National Grid found in 220 C.M.R. § 11.01(2) be revised to read "Massachusetts Electric Company and Nantucket Electric Company d/b/a National Grid." Upon further consideration, the Department has instead determined to delete all references to specific electric companies in this section.

As to National Grid's recommendation to replace the word "New York" with "adjacent control area" in the definition of Renewable Resources found in 220 C.M.R. § 11.02, the Department declines to make the requested change because it is beyond the scope of the rulemaking and may be affected by the recently enacted Green Communities Act.

The Department adopts the following definition found at 220 C.M.R. § 11.02. Independent System Operator: "means ISO New England, Inc. authorized by the Federal Energy Regulatory Commission to operate the New England bulk power system and administer New England's organized wholesale electricity market pursuant to the ISO Tariff and operating agreements with transmission owners." We also make the identical change in 220 C.M.R. § 8.02.

National Grid comments that the Default/Basic Generation Service language in 220 C.M.R. § 11.04(9)(c)(2)(b), Distribution Company Requirements does not reflect the provision by the Department for a three-month rate for large industrial customers pursuant to its Order in D.T.E. 02-40-C (National Grid Comments at 7). The Department declines to

adopt this change. The language at issue is found in G.L. c. 164, §1B(d), which provides in part that:

> The distribution company shall procure such service through competitive bidding; provided, however, that the default service rate so procured shall not exceed the average monthly market price of electricity; and provided, further, that all bids shall include payment options with rates that remain uniform for periods of up to six months.

National Grid recommends that the Department include at 220 C.M.R. § 11.05(4)(c), Affirmative Choice, the option for the electronic verification of customer authorization (National Grid Comments at 8). National Grid also recommends that the Department amend the information filing requirements found at 220 C.M.R. § 11.05(2)(b)(14). Since the Department did not include such proposals in its notice of rulemaking, such changes would be substantive and are beyond the scope of this rulemaking.

As to National Grid's recommendation to delete references to Standard Offer Generation service, we find that this recommendation is beyond the scope of the rulemaking and will be more appropriately addressed in a separate proceeding. Additionally, the Department declines to delete the definition of "Unit Contract."

RESA proposes numerous substantive changes to 220 C.M.R § 11.00, et seq. Many other commenters noted that RESA's proposals were beyond the scope of this rulemaking and should not be adopted without additional investigation and comment (National Grid Reply Comments at 1-2, Attorney General Reply Comments at 3-4, NSTAR Reply Comments at 1-2, Tr. at 17). The Department agrees that it did not provide notice of these substantive changes, which are beyond the scope of this rulemaking.

The Attorney General also argued that the Department should not delete the reference "in a general rate case" found in 220 C.M.R. § 11.04(10)(e). The Department declines to adopt the Attorney General's recommendation because we find that it is sufficient for the regulation to specify that the Department will establish the amount and method of recovery.

Additionally, the last paragraph of 220 CMR § 11.05(2)(b) provides, in relation to updated license applications, the following: "[a]ny Applicant who knowingly submits misleading, incomplete or inaccurate information may be penalized in **accordance with statute and with the regulations** promulgated by the Department"(bold added). The Department is revising this section so that it is more specific as follows: "[a]ny Applicant who knowingly submits misleading, incomplete or inaccurate information may be penalized in accordance with G.L. c. 164, § 1F(7) and 220 C.M.R. § 11.05(2)."

The Department's proposed revisions in 220 C.M.R. § 11.00 remove electric company names, correct a typographical error at § 11.07(4), make changes consistent with the ending of the standard offer generation service period, and establish a definition of Basic Service, a term previously approved by the Department in D.T.E. 04-115-A. The Department adopts these revisions.

L. 220 C.M.R. § 12.00 et seq.

The Department adopts the proposed revision to 220 C.M.R. § 12.00, which updates the Department's name.

National Grid proposed that the Department revise 220 C.M.R. § 12.03(9) because the rule appears very broad and would make it impracticable for a distribution company to use a

non-competitive affiliate (National Grid Reply Comments at 2). This recommendation is beyond the scope of this rulemaking.

M. 220 C.M.R. § 14.00 et seq.

The Department did not receive any comments on this section, and adopts the proposed revisions to 220 C.M.R. § 14.00, which updates the Department's name and corrects a reference from "electricity" to "natural gas" in 220 C.M.R. § 14.04(4)(d). Additionally, the Department has deleted references to specific company names.

N. 220 C.M.R. § 25.00 et seq.

The Department received no comments on this section, and adopts proposed revisions to 220 C.M.R. § 25.00, which updates the Department's name and corrects several typographical errors.

O. 220 C.M.R. § 99.00 et seq.

The Department received no comments on this section, and adopts the proposed revisions to 220 C.M.R. § 99.00, which updates the Department's name, corrects statutory cites, corrects typographical errors, and updates fines so that they are consistent with statutory changes.

P. 220 C.M.R. § 109.00 et seq.

The Department received no comments on this section, and adopts the proposed revision to 220 C.M.R. § 109.00, which updates the Department's name.

Q. 220 C.M.R. § 126.00 et seq.

The Department received no comments on this section, and adopts the proposed revision to 220 C.M.R. § 126.00, which corrects a reference to the National Electric Safety Code in 220 C.M.R. § 126.31(5).

R. 220 C.M.R. § 152.00 et seq.

The Department received no comments on this section, and adopts the proposed revision to 220 C.M.R. § 152.00, which deletes reference to a bond no longer required and corrects section references.

S. 220 C.M.R. § 153.00 et seq.

The Department received no comments on this section, and rescinds 220 C.M.R. § 153.00 because it is outdated.

T. 220 C.M.R. § 155.00 et seq.

The Department received no comments on this section, and adopts the proposed revisions to 220 C.M.R. § 155.00, which updates the Department's name and corrects a typographical error.

U. 220 C.M.R. § 250.00 et seq.

The Department received no comments on this section, and adopts the proposed revisions to 220 C.M.R. § 250.00, which inserts "Oversight" into Transportation Division title and updates the Department's address.

A copy of the current regulations incorporating the proposed revisions is available at the Department's website at www.mass.gov/dpu. The effective date of these regulation shall be the final date of publication in the Massachusetts register.

V. ORDER

Accordingly, after due notice, hearing and consideration, it is

ORDERED: That the Department's regulations are hereby amended.

By Order of the Department,

/s/
Paul Hibbard, Chairman

/s/
W. Robert Keating, Commissioner

/s/
Tim Woolf, Commissioner